



Federal Communications Commission
Washington, D.C. 20554

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DA 13-1082

Small Entity Compliance Guide

Revision of the Commission's Program Access Rules and Sunset of the Exclusive Contract Prohibition

Report and Order and Order on Reconsideration
FCC 12-123
MB Docket Nos. 12-68, 07-29, 07-18, 05-192

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—to comply with the new rule/s adopted in the above-referenced FCC rulemaking docket/s. This Guide is not intended to replace the rule/s and, therefore, final authority rests solely with the rule/s. Although we have attempted to cover all parts of the rule/s that might be especially important to small entities, the coverage may not be exhaustive. As a result, in any civil or administrative action against a small entity for a violation of a rule or rules, the content of the Small Entity Compliance Guide may be considered only as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. This Guide may not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide maybe considered as evidence of the reasonableness or appropriateness of proposed fines, penalties and damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

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OBJECTIVES OF THE PROCEEDING

Since 1992, the exclusive contract prohibition of the program access rules has generally banned exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor in areas served by a cable operator. In the Report and Order in MB Docket Nos. 12-68, 07-18, and 05-192, the Commission declined to extend the exclusive contract prohibition beyond its scheduled October 5, 2012 sunset date, finding that the prohibition is no longer “necessary to preserve and protect competition and diversity in the distribution of video programming.” The Commission will instead rely on existing protections in the program access rules¹ to protect multichannel video programming distributors (“MVPDs”) in their efforts to compete in the video distribution market, including the case-by-case consideration of individual exclusive contracts pursuant to Section 628(b) of the Communications Act (47 U.S.C. § 548(b)).

Following the sunset of the exclusive contract ban, MVPDs will have the option of filing a complaint alleging that an exclusive contract for satellite-delivered, cable-affiliated programming violates Section 628(b). Section 628(b) prohibits

a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor from engaging in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

The Commission will review such complaints on a case-by-case basis. The case-by-case complaint process is described in detail below.

In the Order on Reconsideration in MB Docket No. 07-29, the Commission makes minor revisions to the program access complaint procedures. The Commission modifies the standard protective order for use in program access complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individuals seeking access to confidential information. The Commission also clarifies that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

IMPORTANT DEFINITIONS

“Area served by a cable system” means an area actually passed by a cable system and which can be connected for a standard connection fee.

“Exclusive contract” is defined as a contract that results in one cable operator having access to a particular cable-affiliated programming network or networks in a given geographic area, to the exclusion of every other MVPD competing in that geographic area.

“Multichannel video programming distributor” (“MVPD”) is defined as an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a broadband radio service provider, an educational broadband service provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities. A video programming provider that provides more than one channel of video programming on an open video system is also a multichannel video programming distributor.

“Regional sports network” (“RSN”) is defined as any non-broadcast video programming service that both:

¹ See 47 C.F.R. §§ 76.1001, 76.1002.

- (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball, Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division; and
- (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria set forth in (1), or 10% of the regular season games of at least one sports team that meets the criteria set forth in (1).

"Satellite broadcast programming" is defined as broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

"Satellite broadcast programming vendor" is defined as a fixed service satellite carrier that provides service pursuant to 17 USC § 119, with respect to satellite broadcast programming.

"Satellite cable programming" is defined as video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers or open video system subscribers, except that such term does not include satellite broadcast programming.

"Satellite cable programming vendor" is defined as a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

"Satellite-delivered programming" refers to satellite cable programming and satellite broadcast programming collectively.

"Selective refusal to license" refers to the singling out, by a satellite-delivered, cable-affiliated programmer, of a particular MVPD (such as a satellite provider or a small, rural, or new entrant MVPD) for differential treatment by refusing to license its content to the MVPD while simultaneously licensing its content to other MVPDs competing in the same geographic area.

"Subdistribution agreement" is defined as an arrangement by which a local cable operator is given the right by a satellite cable programming vendor or satellite broadcast programming vendor to distribute the vendor's programming to competing MVPDs.

COMPLIANCE REQUIREMENTS

1. Provisions Applicable to Cable Operators and Satellite-Delivered, Cable-Affiliated Programmers

Following the sunset of the exclusive contract ban, cable operators and satellite-delivered, cable-affiliated programmers may:

- Enter into exclusive contracts for satellite-delivered, cable affiliated programming in areas served by a cable system. As detailed below, the Commission will rely on a case-by-case approach to assess whether individual exclusive contracts involving satellite-delivered, cable-affiliated programming violate Section 628(b) of the Act.
- Enter into subdistribution agreements in areas served by a cable system, provided that the agreements comply with the requirements of 47 C.F.R. § 76.1002(c)(3)(ii).
- File a Petition for Exclusivity seeking a ruling from the Commission that an exclusive contract is in the public interest. The grant of such a petition will immunize the exclusive contract from any future discrimination complaints under Section 628(c)(2)(B) of the Act (47 U.S.C. § 548(c)(2)(B)).

The sunset of the exclusive contract ban will not alter the Commission's treatment of selective refusals to license. A selective refusal to license will continue to be a violation of the discrimination provision in Section 628(c)(2)(B) of the Act, unless the programmer can show a "legitimate business reason" for the conduct, such as the MVPD's history of defaulting on other programming contracts, or the programmer's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific MVPD. Thus, an MVPD will still have the ability to file a discrimination complaint challenging a selective refusal to license.

2. Case-by-Case Complaint Process

An MVPD may file a complaint alleging that a particular exclusive contract for satellite-delivered, cable-affiliated programming violates Section 628(b). The Commission will review such complaints on a case-by-case basis.

Under the case-by-case approach, the complainant will have the burden of showing both:

- that the exclusive contract is "unfair"; and
- that the exclusive contract has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming.

In determining whether an exclusive contract is "unfair," the Commission balances the anticompetitive harms of the contract against its procompetitive benefits.

The evidence required to prove that a given exclusive contract has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming will vary based on the specific facts and circumstance in each case, and may depend on whether the complainant is a new entrant or an established competitor, and whether the programming involved is new programming. Examples of the kinds of evidence that the complainant could offer include:

- regression analyses that estimate what the complainant's market share in the MVPD market would be if it had access to the programming and how that compares to its actual market share; and
- statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or not to switch to an MVPD that did not carry the programming at issue.

The reliability of any evidence offered will be determined on a case-by-case basis.

For exclusive contracts involving a satellite-delivered, cable-affiliated RSN, there is a rebuttable presumption that the contract has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming. The complainant has the burden of showing that the network involved is an RSN. A defendant may overcome this presumption by establishing that the exclusive contract does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming.

A high definition ("HD") version of a network will be treated separately from the standard definition ("SD") version of that network when determining whether an exclusive contract violates Section 628(b). An exclusive contract involving only the HD version of a network could still be found to violate Section 628(b), even if the complainant offers the SD version of the network. For exclusive contracts involving the HD version of an RSN, there is a rebuttable presumption that the contract results in significant hindrance, even if the complainant offers the SD version of the network.

Once a complaint alleging a violation of Section 628(b) has been filed, the defendant will have 45 days to file an answer to the complaint. This 45-day answer period will apply regardless of whether the complaint involves satellite-delivered or terrestrially-delivered programming. If a complainant alleges violations of both Section 628(b) and Section 628(c), the 45-day answer period (rather than the 20-day answer period applicable to Section 628(c) complaints) will apply.

The Media Bureau will have six months from the date a complaint is filed to issue a decision on the complaint. This deadline will apply regardless of whether the complaint involves terrestrially-delivered or satellite-delivered programming.

3. Other Revisions to Program Access Complaint Procedures

The Commission's standard protective order for Section 628 program access complaint proceedings has been revised to include a provision allowing a party to object to a request for documents based on concerns about the individuals seeking access to confidential information. Under this provision, an individual seeking access to confidential information will be required to provide at least five business days' notice to the submitting party prior to accessing any protected documents to give the submitting party the opportunity to object. If the submitting party objects, the individual will not be provided access to the protected documents until the Commission rules on the objection.

The program access complaint procedures have also been revised to clarify that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work product privilege, or other recognized protections from disclosure. The work product privilege may also extend to confidential exchanges between programmers and their accountants or experts if these materials are prepared in anticipation of litigation.

INTERNET LINKS

Revision of the Commission's Program Access Rules et al., Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, and Order on Reconsideration in MB Docket No. 07-29, 27 FCC Rcd 12605 (2012):

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